tance of notice,[21] reasonable probability thereof would seem to furnish the requisite test of due process.[22] It is arguable therefore that extraterritorial service, insuring as it does actual notice, as distinguished from substituted service, where the defendant may be left in actual ignorance of the proceedings against him, should not be regarded as violative of due process.[23]

WHAT CONSTITUTES A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER WITHIN THE STATUTE OF FRAUDS.—There have been few sources of litigation more prolific than that section of the English Statute of Frauds which, together with its American counterparts, requires that a promise to answer for the debt, default or miscarriage of another be in writing.[1] Yet in view of the accepted judicial construction of the Statute that only those promises which are collateral fall within either its letter or its spirit, it is necessary in a given case to determine only[2] if the defendant's promise which in terms is to answer for another's obligation, is in truth an undertaking of guaranty, for if it is absolute and not conditioned upon another's default, it is original and may be made orally.[3] In determining this question it was early declared that any new consideration, whether of harm to the promisee or of benefit to the promisor, was sufficient to avoid the operation of the Statute.[4] The manifest inadequacy of this test, which in effect repeals the Statute, lies in the fact that, embodying only the requirement which attends every binding promise, it suggests nothing further to indicate its nature or to vary its legal consequence. Nevertheless, the position taken by Chancellor Kent, although generally discredited, is perhaps the pivotal point of subsequent doctrines by which it is variously modified.

The limitation imposed in some jurisdictions, of which Massachusetts is typical, restricts original promises to those made in the course of a transaction from which it may fairly be inferred that the leading object of the promisor was to obtain some benefit which enured to him by reason of his promise.[5] The English courts, however, deny that it

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[21]Kilburn *v.* Woodworth (N. Y. 1809) 5 Johns. 37; Betancourt *v.* Eberlin *supra.* Even in proceedings *in rem,* where jurisdiction over property is conferred by force of its location, due process may be violated where reasonable notice is not afforded to the owner. Roller *v.* Holly (1900) 176 U. S. 398.

[22]Betancourt *v.* Eberlin *supra;* Matter of Empire City Bank (1858) 18 N. Y. 199, 215; Roller *v.* Holly *supra;* see Happy *v.* Mosher (1872) 48 N. Y. 313; Pinney *v.* Providence etc. Co. (1900) 106 Wis. 396; Pennoyer *v.* Neff *supra.*

[23]*Cf.* 5 COLUMBIA LAW REVIEW 436.

[1]29 Car. II c. 3, § 4.

[2]It is fundamental that if the promise is made to the debtor it is not within the Statute. See Clark *v.* Jones (1887) 85 Ala. 127.

[3]Browne, Statute of Frauds (5th ed.) § 212. See Gibbs *v.* Blanchard (1867) 15 Mich. 292; Baldwin *v.* Hiers (1884) 73 Ga. 739.

[4]Chancellor Kent in Leonard *v.* Vredenburgh (N. Y. 1911) 8 Johns. 29. See also Farley *v.* Cleveland (N. Y. 1825) 4 Cow. 432; Scott *v.* Thomas (1832) 2 Ill. 58. But see Mallory *v.* Gillette (1860) 21 N. Y. 412.

[5]Nelson *v.* Boynton (Mass. 1841) 3 Metc. 396; Curtis *v.* Brown (Mass. 1850) 5 Cush. 488; Furbish *v.* Goodnow (1867) 98 Mass. 296; Ames *v.* Foster (1871) 106 Mass. 400. And see Alger *v.* Scoville (Mass. 1854) 1 Gray 391; Emerson *v.* Slater (1859) 22 How. 28; Davis *v.* Patrick (1891) 141 U. S. 479.

is sufficient that the object of the contract was to promote the promisor's personal interest[6] and demand a larger matter for its object, such as the purchase of property or the relief of property from a liability.[7] Under the rule as finally evolved in New York a promise is absolute only when founded on a beneficial consideration moving to the promisor, so that he thereby comes under an independent duty irrespective of the liability of the principal debtor.[8]. It will be observed that each of these tests contemplates the receipt of some advantage by the defendant from the plaintiff and the cases reveal the unmistakable tendency of the courts to declare a promise original only when the promisor himself acquires some property or right relinquished by the promisee.[9] Thus the line is drawn between a merely valid consideration sufficient to support a promise of guaranty and that transfer of value which of itself creates an original obligation on the part of the transferee.[10]

In this distinction is to be found the means of rationalizing, although not of justifying, the doctrines which suggest it. The significance of the necessity of a "transfer of value" becomes apparent in the light of the established principle of Quasi-Contracts that one relying on the Statute of Frauds is liable for the benefits received under the contract which he seeks to repudiate.[11] When, therefore, a promisor has obtained something beneficial to him, he has by reason of the entire transaction of which his promise to pay another's debt was only a part, incurred a duty beyond that imposed by his express promise,[12] and as a promise to discharge one's own obligation is unaffected by the Statute,[13] the courts are quick to find an absolute undertaking whenever to sustain the defense of the Statute would result in enriching the defendant at the plaintiff's cost. This theory finds support in cases where the defendant possesses property of the debtor with which to pay the latter's debt.[14] A trust, or a relation closely akin, being thus created, the defendant, irrespective of a promise to the creditor, is subjected to a duty upon a breach of which *indebitatus assumpsit* will lie in the latter's favor.[15] In this class of cases also, a duty having arisen from the

[6]Harburg India Rubber Comb Co. *v.* Martin L. R. [1902] 1 K. B. 778,

[7]Castling *v.* Aubert (1802) 2 East 325; Fitzgerald *v.* Dressler (1859) 7 C. B. [N. S.] 374.

[8]White *v.* Rintoul (1888) 108 N. Y. 222. See Raabe *v.* Squier (1895) 148 N. Y. 81.

[9]Carleton *v.* Floyd (1906) 192 Mass. 204. This tendency is illustrated by the almost invariable rule that a promise given for the plaintiff's forbearance to sue the principal debtor is collateral. 7 Halsbury, Laws of England 363; Nelson *v.* Boynton *supra.*

[10]Browne, Statute of Frauds (5th ed.) §§ 214a, 214c.

[11]Keener, Quasi-Contracts 277 *et seq.*

[12]1 Williams Saunders 211n.

[13]Barker *v.* Bucklin (N. Y. 1846) 2 Denio 45. *Cf.* Ames, Parol Contracts Prior to Assumpsit 8 Harv. L. Rev. 264; Schoenfeld *v.* Brown (1875) 78 Ill. 487; Elder *v.* Warfield (Md. 1826) 7 Harr. & J. 391.

[14]Williams *v.* Leper (1766) 3 Burr. 1886; Davis *v.* Banks (1872) 45 Ga. 138; Goodwin *v.* Bowden (1867) 54 Me. 424; First National Bank *v.* Chalmers (1895) 144 N. Y. 432. And see Fullam *v.* Adams (1864) 37 Vt. 391; Ackley *v.* Parmenter (1885) 98 N. Y. 425; Eddy *v.* Roberts (1856) 17 Ill. 505.

[15]See Key *v.* Gordon (1701) 12 Mod. 521; Hitchcock *v.* Lukens (Ala. 1839) 8 Port. 333; Kreutz *v.* Livingston (1860) 15 Cal. 345; Miller *v.* Billingsly (1873) 41 Ind. 489.

"res gestae," the Statute is no defense to an action on the defendant's promise to the creditor to discharge the debtor's obligation. Nevertheless, although this theory would explain recovery to the extent of the defendant's enrichment[16] or of the funds in his hands, it is obvious that it cannot justify recovery on the promise itself, for in spite of the existence of a personal duty the promisor's undertaking may in fact be one of guaranty.

It would seem, therefore, that none of the tests enumerated goes to the essence of the real problem, the substance of the promise, although the courts employing them are careful to assert that their endeavors are directed solely towards its solution.[17] Whether the defendant is a principal debtor, primarily liable, or whether he is liable only in the event of another's default depends alone on his intention[18] and although the nature of the consideration, the motive of the promisor and the object of the contract may be excellent evidence of an intention to assume rather than to answer for another's obligation, they are pertinent only for that purpose and should not themselves be the object of ultimate inquiry.[19] Where the promise is contemporaneous with the creation of the debt, the intention of the parties controls and it should be equally decisive when the promise is to pay an antecedent debt.

Confronted by the problem under consideration, the court in a recent case, *Hurst Hardware Co.* v. *Goodman* (W. Va. 1910) 69 S. E. 898, declared the defendant's promise collateral since it did not appear that his leading object was to benefit himself. As there was no transfer of value from the plaintiff to the defendant the conclusion is in harmony with the tendency of modern decisions, but it is submitted that the result could have been more securely rested on the logical ground that the promisor did not intend to become primarily liable.

THE VENDOR'S DAMAGES IN INSTALLMENT CONTRACTS OF SALE.—In actions brought for the non-acceptance of saleable goods under an executory contract, the orthodox measure of damages is the difference between the contract and market price at the time and place set for performance.[1] This rule has apparently no relation to the doctrine of minimizing damages, but is a necessary consequence of the situation of the parties at the time of breach. As damages in any contract action are designed merely to place the injured party in as favorable a situation as though the contract had been performed,[2] the recovery of a vendor who still has his property is necessarily limited to the excess of the agreed price of the commodity over its present actual value,

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[16]Keener, Quasi-Contracts 279.

[17]See Harburg India Rubber Comb Co. *v.* Martin *supra;* Ames *v.* Foster *supra.*

[18]See Smart *v.* Smart (1885) 97 N. Y. 559; Clark *v.* Howard (1896) 150 N. Y. 232; Birchell *v.* Neaster (1881) 36 Oh. St. 331; Maule *v.* Bucknell (1865) 50 Pa. St. 339; Reed *v.* Holcomb (1863) 31 Conn. 360; Norris *v.* Spencer (1841) 18 Me. 324.

[19]Langdell, Lecture Note 4 Harv. L. Rev. 290. *Cf.* Brown *v.* Weber (1868) 38 N. Y. 187; Browne, Statute of Frauds (5th ed.) § 214.

[1]Unexcelled Fire-Works Co. *v.* Polites (1890) 130 Pa. St. 536; Williston, Sales § 582.

[2]Barnes *v.* Brown (1892) 130 N. Y. 372.